Teletech Holdings, Inc. *and* United Food and Commercial Workers Union, Local 381 AFL–CIO. Cases 19–CA–28331, 19–CA–28371, 19–CA–28570, and 19–CA–28700.

August 31, 2004

DECISION AND ORDER

BY MEMBERS SCHAUMBER, WALSH, AND MEISBURG

On December 19, 2003, Administrative Law Judge Mary Miller Cracraft issued the attached decision. The Respondent, the Charging Party, and the General Counsel filed joint limited exceptions.[1]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the joint exceptions and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order as modified and set forth in full below.[2]

ORDER

The National Labor Relations Board orders that the Respondent, Teletech Holdings, Inc., Bremerton, Washington, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Asking employees what they think about United Food and Commercial Workers Union, Local 381, AFL–CIO, or any other union.

(b) Telling employees that the Temple, Texas facility is closing because the employees there tried to form a union and that is what happens when employees try to form a union.

(c) Requesting employees to remove union insignia from their clothing.

(d) Asking employees for their name if they are attempting to handbill for the Union.

(e) Making notes while watching handbilling activity.

(f) Prohibiting union handbilling in public areas near the parking lot.

(g) Selectively enforcing cubicle ornamentation guidelines only in response to union literature being placed in cubicles.

(h) Prohibiting off-duty employees who are handbilling union literature from entering the parking lot.

(i) Telling employees that they cannot criticize their jobs or the company.

(j) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days after service by the Region, post at its facility in Bremerton, Washington, copies of the attached noticed marked "Appendix."[3] Copies of the notice, on forms provided by the Regional Director for Region 19, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 2002.

(b) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

[1] Pursuant to joint extension requests, exceptions were due on February 6, 2004. On April 9, 2004, the instant joint exceptions, dated February 3, 2004, were refiled. It appears that the original joint limited exceptions, although timely deposited in the U.S. Mail, failed to arrive at the Board in Washington, D.C. As all parties were timely served on February 6, as no party objects to the April 9 filing,, and based on the nature of the exceptions, the Board has decided to accept the joint limited exceptions.

[2] As these modifications to the judge's recommended Order and recommended notice to employees more accurately reflect her findings, we grant the joint limited exceptions.

[3] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Choose not to engage in any of these protected activities.

WE WILL NOT ask you what you think about United Food and Commercial Workers Union, Local 381, AFL–CIO, or any other union.

WE WILL NOT tell you that the Temple, Texas facility is closing because the employees there tried to form a union and that is what happens when employees try to form a union.

WE WILL NOT request that any of you remove union insignia from your clothing.

WE WILL NOT ask you for your name if you are attempting to handbill for the union.

WE WILL NOT make notes while watching handbilling activity.

WE WILL NOT prohibit union handbilling in public areas near the parking lot.

WE WILL NOT selectively enforce cubicle ornamentation guidelines only in response to union literature being placed in cubicles.

WE WILL NOT prohibit off-duty employees who are handbilling union literature from entering the parking lot.

WE WILL NOT tell you that you cannot criticize your jobs or the company.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of your rights set forth above.

TELETECH HOLDINGS, INC.

Richard C. Fiol, Esq., for the General Counsel.
Aaron A. Roblan, Esq., of Seattle, Washington, and *David Allen, Esq.,* of Los Angeles, California, for the Respondent.
Mark E. Brennan, Esq., of Seattle, Washington, for the Charging Party.

DECISION

STATEMENT OF THE CASE

MARY MILLER CRACRAFT, Administrative Law Judge. The General Counsel alleges that Respondent Teletech Holdings, Inc. interrogated, threatened, and surveilled its employees because of their activities on behalf of United Food and Commercial Workers Union, Local 381, AFL–CIO (the Union), ordered employees to remove union insignia from their clothing and work areas, selectively and disparately enforced a no-solicitation, no-distribution rule against the Union by prohibiting the posting of union literature in work cubicles and by prohibiting the Union access to the cafeteria and parking lot, and promulgated and maintained a rule prohibiting employee access to nonwork areas after scheduled hours.[1]

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by counsel for the General Counsel and counsel for the Respondent, I make the following[2]

FINDINGS OF FACT

I. JURISDICTION AND LABOR ORGANIZATION STATUS

Respondent, a State of Colorado corporation, maintains an office and place of business in Bremerton, Washington, where it is engaged in providing customer services for telecommunications' organizations. During the 12-month period ending April 22, 2003, Respondent sold and shipped goods or provided services from its facility within the State of Colorado to customers within the State of Colorado, which customers were themselves engaged in interstate commerce by other than indirect means, of a total value in excess of $50,000. Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. Respondent admits and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. BACKGROUND

In February 2002, Respondent began operating a 24-hour, 7-day per week customer service center in Bremerton, Washington, for cellular telephone service providers including Nextel Corporation. Approximately 600 customer-care employees were employed at the Bremerton facility at the time of this hearing. About 300 of these employees were hired during Respondent's first year of operation. The remainder of the employees transitioned from the prior owner, Nextel Corporation. All customer-care employees work in a cubicle equipped with a headphone, computer, desk, and chair.

The Union began an organizational drive in May 2002. In July 2002, Respondent was informed that the Union was conducting an organizational drive.

III. ALLEGED INTERROGATION

There is agreement among all witnesses that in July 2002, Supervisor Nathan Hayward spoke individually to employees under his supervision. There is disagreement regarding whether Hayward asked how employees felt about the Union, as employees Tamara Oien and Marlaina Shephard testified, or whether Hayward asked if employees had any questions or anything they would like to discuss about Respondent's position letter about the Union, as Hayward testified.

Employees Oien and Shephard recalled the incident in significant detail. Both stated that Hayward came into the cubicle she occupied, instructed her to block incoming customer calls

[1] The Union filed the charge and amended charge in Case 19–CA–28331 on November 26 and December 18, 2002; the charge in Case 19–CA–28371 on December 23, 2002; and the charge and amended charge in Case 19–CA–28570 on March 24, and April 22, 2003. The second consolidated complaint issued on April 22, 2003. These cases were tried in Seattle, Washington, on May 6–9 and June 3–4, 2003. Thereafter, the Union filed the charge in Case 19–CA–28700 on May 30, 2003, and the complaint issued on July 31, 2003. On August 3, 2003, the record was reopened to hear Case 19–CA–28700. Trial was on October 9, 2003.

[2] Credibility resolutions have been made based upon witness demeanor, the weight of respective evidence, established or omitted facts, apparent probability, and reasonable inferences drawn from the record as a whole. Testimony contrary to my findings has been discredited on some occasions because it was in conflict with credited testimony or documents or because it was inherently incredible and unworthy of belief.

by placing the phone in "not ready," and then asked what each thought of the Union. Oien told Hayward she supported the Union. Shephard told Hayward he could not ask her such a question. Both Oien and Shephard observed Hayward approach other employees, individually, after he concluded his discussion with each of them.

Hayward agreed that he spoke to 11 or 12 employees. Hayward testified that his discussions followed the publication of Respondent's position letter on unionization. The position letter was not produced at the hearing. Hayward testified that he did not ask employees how they felt about the Union. Rather, according to Hayward, he asked whether employees had any questions about the letter or anything that they would like to discuss about the letter.

As current employees testifying against their own economic self-interest, Oien and Shephard are accorded enhanced credibility. *7-Eleven Food Stores*, 257 NLRB 108, 113 fn. 31 (1981); *Georgia Rug Mill*, 131 NLRB 1304 fn. 2 (1961), enfd. 308 F.2d 89 (5th Cir. 1962). However, current employee status is only one factor among many that may be utilized to determine credibility. *Flexsteel Industries*, 316 NLRB 745 (1995), enfd. mem. 83 F.3d. 419 (5th Cir. 1996). On balance, I credit Oien and Shephard's versions of the conversation. Both provided detailed, vivid accounts of the conversation each had with Hayward. On the other hand, Hayward admitted that it was difficult to recall his exact conversation with any of the employees. Hayward offered that he was looking for, "just kind of a temperature, like a climate of their response to the letter."

> In determining whether a supervisor's questions to an employee constitute an unlawful interrogation, the Board examines whether, under all the circumstances, the questioning reasonably tends to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights. *Rossmore House*, 269 NLRB 1176 (1984), affd. sub. nom. *Hotel Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985). Under this totality of circumstances approach, the Board examines factors such as the employer's background (i.e., whether there is a history of employer hostility and discrimination); the nature of the information sought (e.g., whether the interrogator appeared to be seeking information on which to base action against individual employees); the identity of the questioner (i.e., his position in the company hierarchy); place and method of interrogation (e.g., whether the employee was called from work to the boss' office; whether the tone of the questioning was hostile or threatening); and truthfulness of the reply. *Bourne v. NLRB*, 332 F.2d 47, 48 (2d Cir. 1964). Although "strict evaluation of each factor" is not required, these "useful indicia . . . serve as a starting point for assessing the totality of the circumstance[s]." *Perdue Farms, Inc. v. NLRB*, 144 F.3d 830, 835 (D.C. Cir. 1998).

Heartshare Human Services of New York, Inc., 339 NLRB 842, 843 (2003); see also, *La Gloria Oil & Gas Co.*, 337 NLRB 1120 1122–1123 (2002), enf. 71 Fed. Appx. 441 (5th Cir. 2003):

> The test of whether an unlawful interrogation has occurred is whether, under all the circumstances, the alleged interrogation reasonably tends to restrain, coerce, or interfere with the employees in the exercise of rights guaranteed by the Act. *Rossmore House*, 269 NLRB 1176, 1177–1178 (1984). An appropriate analysis of whether an unlawful interrogation has occurred must consider the circumstances surrounding the alleged interrogation, such as the background of the relationship, the nature of the information sought, the identity of the questioner, and the place and method of interrogation. *Sunnyvale Medical Clinic*, 277 NLRB 1217, 1218 (1985).

Hayward was the immediate supervisor of the employees involved. Although at the time of the conversations there was not a history of employer hostility or discrimination and there is no indication whether Hayward's tone was hostile or threatening, I find based upon the totality of circumstances that Hayward's questioning was coercive. I note that Hayward's instruction to the employees to stop answering calls and place their phone in "not ready" indicated the serious nature of the conversation which ensued. Moreover, each employee was questioned serially after being requested to stop answering customer calls. Finally, I note that asking an employee what he or she thinks of the Union might reasonably be understood by an employee to indicate that future action might be taken depending on what the employee's answer was. Accordingly, I find that by asking employees what they thought about the Union, Respondent interfered with, restrained, and coerced employees in the exercise of their rights guaranteed by Section 7 of the Act.[3]

IV. ALLEGED THREAT OF JOB LOSS

Employee Darlene Wood testified that on August 8, 2002, between 8:30 and 9 p.m., Supervisor Edward Fassio spoke with employees Melody McMoore, Erin Avery, Julianna Buzzard, Jeremy Key, and Wood. McMoore asked Fassio why Respondent's Temple, Texas facility was closing. Fassio responded, according to Wood, that it was because the employees tried to form a union. Although Fassio left the conversation after making this statement, the employees continued to whisper about Fassio's earlier comment. Fassio rejoined the conversation, asking the employees what they were talking about. When Fassio was told the employees could not believe what was happening at Temple, Texas, Fassio responded, "[T]hat is what happens when you try to form a union." Fassio, who no longer worked for Respondent at the time of the hearing, did not testify.

Wood's testimony was detailed. She impressed me as a credible witness. I find that Fassio told employees that Respondent's Temple, Texas facility closed because employees sought to unionize and that when employees seek to unionize, facilities may be closed. These statements constitute unlawful threats of job loss because employees support the Union. See, e.g., *Day-*

[3] In *Heartshare Human Services*, supra, a two-member majority set forth "the truthfulness of the answer" as an additional factor. In explication, the two-member majority noted that because the interrogated employees therein answered truthfully, nothing in the question could reasonably inspire fear in the employees. In the instant case, Oien responded that she supported the Union. Shepard asserted that it was unlawful for Hayward to interrogate her. Perhaps Oien did support the Union in July 2002. Certainly by March 2003, Oien handbilled on behalf of the Union. Shepard did not respond directly to the question. In the final analysis, this factor does not provide additional evidence regarding whether under all the circumstances the questioning reasonably tended to interfere with, restrain, or coerce the employees.

ton Newspapers, Inc., 339 NLRB 650 (2003). Although Wood agreed that Fassio was generally jocular or "funny," even if his statements to Wood, McMoore, and the others were made in a jocular tone, and there is no evidence that they were, as counsel for the General Counsel notes, this does not lessen the coercive impact of his statements. *Intercon I Zercom),* 333 NLRB 223, 237 (2001). Accordingly, I find that by telling employees that Respondent's Temple, Texas facility was closing because employees sought to unionize and "[T]hat is what happens when you try to form a union," Respondent threatened employees with loss of their jobs because they were supporting the Union and thus, interfered with, restrained, and coerced employees in the exercise of their rights guaranteed by Section 7 of the Act.

V. REQUEST TO REMOVE UNION INSIGNIA FROM CLOTHING (STIPULATED)

The parties stipulated that on August 18, 2002, Supervisor Charles Quante requested that Darlene Wood remove union insignia from her clothing. Respondent presented evidence that on the following day, Supervisor Adam Matthew told Wood that Quante was incorrect and she could wear union buttons if she desired to do so. Wood denied that Matthew told her that she could wear union buttons.

Absent special considerations, Section 7 protects the right of employees to wear union buttons or insignia. See, e.g., *Republic Aviation Corp. v. NLRB,* 324 U.S. 793, 803 (1945); *Control Services,* 303 NLRB 481, 485 (1991), enfd. 961 F.2d 1568 (3d Cir. 1992), 975 F.2d 1551 (3d Cir. 1992). There is no contention that special considerations are present in this case.

By instructing an employee to remove union insignia from her clothing, Respondent interfered with, restrained, and coerced employees in the exercise of their Section 7 right to wear union buttons or insignia. Nevertheless, Respondent argues that Matthew's correction of Quante's remark on the following day remedied any violation. Alternatively, Respondent argues that Quante's statement does not constitute a violation of the Act because it was de minimis, relying on *Bellinger Shipyards, Inc.*, 227 NLRB 620 (1976) (conduct which is technically in contravention of the statute may be so insignificant and so largely remedied as to be rendered meaningless by employer's subsequent conduct will not be utilized as basis for remedial order).

Pursuant to *Passavant Memorial Area Hospital,* 237 NLRB 138 (1978), relied upon by counsel for the General Counsel, in order to effectively repudiate conduct violative of the Act, Respondent must have, among other things,[4] acknowledged that the request to remove union insignia was unlawful and assured Wood that the request would not be repeated. Even crediting Matthew's testimony, there was no acknowledgement that the request was unlawful or assurance that the request would not be repeated. Accordingly, Quante's request was not remedied. Moreover, I reject Respondent's argument that Quante's request falls within the de minimis rule. Absent effective repudiation, it is reasonable to infer that Quante's request continued to chill employee exercise of Section 7 rights. See, e.g., *Solutia, Inc.*, 339 NLRB 60 (2003). Thus, Respondent's conduct was not rendered meaningless.

[4] *Passavant* requires that repudiation be timely, unambiguous, specific in nature, free from other proscribed illegal conduct, adequately publicized to employees involved, that no further proscribed conduct occur, and that there be assurances that in the future the employer will not interfere with the exercise of employees' Sec. 7 rights. See *Passavant,* supra at 139. See also *Community Action Commission of Fayette County, Inc.*, 338 NLRB 664 (2002). I note that although *Passavant* remains the extant authority on employer remedy of unfair labor practices, in *Champion International Corp.*, 339 NLRB 672 fn. 6 (2003), a three-member panel of the Board stated that it did not pass on the validity of *Passavant* although it agreed with the administrative law judge that the employer's conduct therein was not cured.

VI. ALLEGED SURVEILLANCE

A. March 10, 2003

At approximately 6 a.m. on March 10, 2003, employees Tamara Oien and Kathy Weigert took seats in the lobby of Respondent's Bremerton Road facility. About 15 feet away from their seats, the main security desk was attended by a male and a female guard. The guards were employees of Cognisa Security which provided 24-hour security services at the Bremerton facility. The male guard, Richard Vela, stated to Oien and Weigert, "[Y]ou better not be distributing any of that union stuff." Weigert responded that they had a right to distribute literature in nonwork areas. Vela asked Oien and Weigert to leave and they complied with his request.

Oien and Weigert then went to the cafeteria. Shortly thereafter, the female security guard approached them and asked for their names. She stated that her supervisor wanted to know who they were. Oien and Weigert gave her their names.

Oien identified the female guard as Beth. Weigert did not testify regarding the name of the female guard. Guard Beth Mederios testified that she did not report to work on March 10, 2003, until 1:58 p.m. Respondent's security logs verify her testimony. These logs also indicate that guard Lynne Eyerly was on duty with Vela at 6 a.m. Based on these logs, counsel for the General Counsel seeks to substitute Lynne Eyerly for Beth Mederios in the complaint allegations. Respondent, on the other hand, submits that Oien and Weigert emphatically testified that Mederios was the guard in question and should therefore be discredited.

The parties fully litigated the issue of whether a female guard asked Oien and Weigert for their names shortly after they attempted to distribute union literature in Respondent's lobby on March 10, 2003. Although Oien identified the guard as Beth, it appears that the guard was Lynne Eyerly and I sustain counsel for the General Counsel's request to substitute Lynne Eyerly's name for that of Beth Mederios.

Vela agreed that he asked two female employees to leave the lobby area because they were attempting to distribute union materials in the lobby. Vela denied that he instructed Beth Mederios to question them or find out their names. Eyerly did not testify. I credit Oien and Weigert and find that a female guard asked for their names after they were observed distributing union literature in the lobby. By asking Oien and Weigert for their names after they attempted to distribute union literature in the lobby, it was reasonable for the employees to assume that their union activities were under surveillance. I find that by asking employees for their names, Respondent created the impression that its employees' union activities were under surveillance.

B. March 12, 2003

At about 1:30 p.m. on March 12, 2003, employee Darlene Wood, two union employees, Frankie and Shelley, and the union's director of organizing, Cindy Feist, distributed handbills to employees entering and exiting Respondent's parking lot. Wood saw Supervisor Susan Sims standing at a window watching the handbillers for about 20 to 30 minutes. According to Wood, Sims appeared to be writing as cars approached the handbillers to accept literature. Feist testified that she observed a woman standing in a window writing while observing the handbilling. Feist asked Wood who the woman was. Wood identified this woman as Susan Sims.

According to supervisor of key corporate accounts, Susan Sims, she was contacted at about 2 or 3 p.m. by employee Talaena Lee. Lee reported that she had been stopped by union handbillers as she exited the parking lot. Lee was upset. Sims walked to a corner window to observe the parking lot. Supervisor Susan Yamashita joined her at the window. They observed handbilling activities but no cars were being stopped. Sims denied that she took notes or that she was holding paper or a pen. Sims and Yamashita stood at the window chatting for 3 to 7 minutes. Darlene Wood waved to them at one point and Sims waved back.

I credit the testimony of Wood and Feist. Although they disagreed regarding which window of the building was involved, both Wood and Feist recalled exact details identically. Both recalled that they were alerted to the note taking by employees who were leaving. Based upon their testimony, I find that by taking notes during employee handbilling, Respondent surveilled employees engaged in union activities.

VII. ALLEGED SELECTIVE AND DISPARATE ENFORCEMENT OF NO-SOLICITATION, NO-DISTRIBUTION RULE

A. The Rule

Respondent maintains a no-solicitation, no-distribution which provides,

> Non-employees may not solicit at any time on Teletech property.
>
> Employees may not solicit or distribute during working time and may not, at any time, distribute in working areas. "Working time" means those hours that employees are on duty, excluding such times as breaks, meal times, and other specifically designated periods during the workday when employees are properly not engaged in performing their work duties. "Working areas" means those areas in Teletech facilities in which Teletech business is conducted, excluding such locations as lunchrooms, cafeterias, break rooms, and other areas in which employees are permitted while not working.
>
> We also believe that it is important that Teletech and its employees are involved in and contribute to the communities in which we work. Therefore, from time to time, we will invite representatives of non-profit charitable organizations to come to our facilities to organize support for their causes. Obviously, your participation in these activities is voluntary, but we think that it is important to give you the opportunity to join us in our community involvement.

Although the no-solicitation, no-distribution rule sets forth specific procedures for nonprofit charitable organization site visits, there is no evidence regarding such visits. Respondent possesses a private property interest in its facility at 1400 N. E. McWilliams Road, sufficient under Washington law to exclude trespassers or third parties. The General Counsel does not dispute Respondent's property interest.

Two issues arise pursuant to this rule. First, may Respondent lawfully prohibit employee display of union-related materials in work cubicles? Second, may Respondent bar nonemployee union representatives access to its nonwork areas while routinely allowing such access to private food vendors?

B. General Principles Regarding Employee No-Solicitation, No-Distribution Rules and Enforcement of These Rules

Generally, analysis of rules limiting or prohibiting employee solicitation and distribution focus on the nature of the activity, the location of the activity, and the individual involved. Thus, the Board routinely distinguishes employee solicitation from employee distribution. Solicitation is oral and, accordingly, interferes with employer interests only because the conversation may occur during working time. Employee distribution of literature, on the other hand, presents the potential of littering and could produce hazards regarding production whether the distribution occurs on working or nonworking time. *Hale Nani Rehabilitation*, 326 NLRB 335 fn. 2 (1998), citing *Stoddard-Quirk Mfg. Co.*, 138 NLRB 615, 619 (1962).

Reflecting this distinction, rules restricting employee solicitation must be limited to working time. Rules restricting employee distribution are lawful in working areas on working and nonworking time. Id., citing *Eastex, Inc.*, 215 NLRB 271, 274–275 (1974), enfd. 550 F.2d 198 (5th Cir. 1977), affd. 437 U.S. 556 (1978).

Assuming a facially valid no-solicitation, no-distribution policy,[5] a further consideration is that the policy be fairly enforced. Disparate enforcement against employee union solicitation or employee distribution of union literature while allowing other employee solicitation or employee distribution will interfere with the exercise of Section 7 rights. See, e.g., *ITT Industries*, 331 NLRB 4 (2000); *New York Telephone Co.*, 304 NLRB 183 (1991).

C. General Principles Regarding Nonemployee Access

Regarding nonemployee access, in *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 112 (1956), the Court held that,

> [A]n employer may validly post his property against nonemployee distribution of union literature if reasonable efforts by the union through other available channels of communication will enable it to reach the employees with its message and if the employer's notice or order does not discriminate against the union by allowing other distribution. In these circumstances the employer may not be compelled to allow distribution.

[5] Although no attack has been made on the facial validity of Respondent's rule, I note that in *Hammary Mfg. Corp.*, 265 NLRB 57 (1982), a rule was held invalid because it explicitly allowed United Way solicitation. "This exception does nothing less than sanction the rule's disparate application and is therefore unlawful."

This test was reaffirmed by the Court in *Lechmere Inc. v. NLRB*, 502 U.S. 527, 533 (1992). In addition, the Court reiterated its earlier basis for finding a "critical distinction" between employees and nonemployees: the organizing activities of employees are guaranteed by Section 7 while Section 7 applies only derivatively to nonemployees. Id. See also *Hale Nani Rehabilitation*, supra, 326 NLRB at 337 fn. 4 (concurrence of Members Fox and Liebman).

Of course, application of rules governing nonemployee access must be fairly administered. If exceptions are made for some nonemployees but not for nonemployee union representatives, *Lechmere* as well as subsequent NLRB decisions, hold that discrimination may have occurred, depending on the particular circumstances of each case. See, *Lechmere*, supra, 502 U.S. at 535 ("To gain access, the union has the burden of showing that no other reasonable means of communicating its organizational message to the employees exists or that the employer's access rules discriminate against union solicitation."); *Lincoln Center for the Performing Arts*, 340 NLRB 1100, 1112 (2003); *Davis Supermarkets*, 306 NLRB 426, 427 (1992).

In both *Babcock* and *Lechmere* the Court defined discrimination against the union as barring union distribution while "allowing other distribution." *Babcock*, supra, 351 U.S. at 112; *Lechmere*, supra, 502 U.S. at 535. In *Sears, Roebuck & Co. v. San Diego County District Council of Carpenters*, 436 U.S. 180 (1978), the Court also defined discrimination against the union as in *Babcock:* "the employer's access rules discriminate against union solicitation [by allowing other distribution.]" Id. 436 U.S. at 205 and fn. 40.

The District of Columbia Circuit Court of Appeals enunciated this test in *Lucile Salter Packard Children's Hospital v. NLRB*, 97 F.3d 583, 587 (1996) (emphasis added, cross-citations omitted), as follows:

> Second, under the "non-discrimination" exception, an employer engages in discrimination as defined by section 8(a)(1) if it denies union access to its premises while allowing *similar* distribution or solicitation by nonemployee entities other than the union. See *Babcock*, 351 U.S. at 112; *Lechmere*, 502 U.S. at 535; *Sears, Roebuck & Co. v. San Diego County District Council of Carpenters*, 436 U.S. 180, 205 (1978); *D'Alessandro's, Inc.*, 292 NLRB 81, 83–84 (1988).

See: in accord *6 West Ltd. Corp. v. NLRB*, 237 F.3d 767, 779–780 (7th Cir. 2001), denying enf. 330 NLRB 527 (2000) (Under "similar distribution" analysis, solicitations for girl scout cookies, Christmas ornaments, and hand-painted bottles cannot under any circumstances be compared to union solicitation). Indeed, the Board has also utilized such language. See, e.g., *Wal-Mart Stores*, 340 NLRB 1216, 1217 (2003) ("while allowing other persons or organizations to engage in similar solicitation" but failing to allow the union to do so, the employer discriminatorily prohibited union agents from handbilling); but see, *Nicks'*, 326 NLRB 997, 1000 fn. 19 (1998) (because no similar solicitation or distribution activity occurred, Members Hurtgen and Brame find it unnecessary to determine the breadth of the discrimination exception).

Finally, when work-related nonemployee solicitation or distribution is allowed to assist the employer in carrying out its functions or when a nonemployee solicitation or distribution is allowed as "an integral part" of the employer's functions and responsibilities, such nonemployee solicitation or distribution is not evidence of disparate treatment. *Rochester General Hospital*, 234 NLRB 253 (1978) (Red Cross postering and blood collection in hospital for blood bank, postering of sales by a volunteer group which donated proceeds to hospital, displaying of pharmaceutical products that doctors might prescribe or pharmacy might purchase, and display of medical books of interest to doctors are work-related activities that assist hospital in carrying out community health care functions and responsibilities and not such disparate application that would require the employer to waive its rule and permit access by nonemployee union organizers); *George Washington University Hospital*, 227 NLRB 1362, 1373–1374, and fn. 39 (1977) (white elephant sales and sales of the Women's Board are excluded from analysis of disparate activities as they are virtually an integral part of the hospital's necessary functions).

D. Nonemployee Access to the Parking Lot: August 19, 2002

On August 19, 2002, union director of organizing, Cindy Feist, a nonemployee, handbilled at the entrance to Respondent's parking lot. Two security guards approached her and told her to stay off Respondent's property. She stated that she was not on Respondent's property and she was exercising a First Amendment right. During the same time period, Respondent allowed an outside vendor, Just Dogs, to sell breakfast and lunch from a trailer parked in Respondent's parking lot.

Counsel for the General Counsel argues that allowing a commercial vendor on the premises to sell products or services which are not a part of Respondent's regular benefit package while prohibiting union solicitation constitutes disparate treatment. Counsel relies upon *Lucile Salter Packard Children's Hospital*, 318 NLRB 433 (1995), enfd. 97 F.3d 583 (7th Cir. 1996); *Ordman's Park & Shop*, 292 NLRB 953, 956 (1989); and *D'Alessandro's Inc.*, 292 NLRB 81, 83–84 (1988).

Respondent claims these cases are distinguishable because Respondent enforced its no-solicitation, no-distribution rule against the vendor. According to Garen Martinson, Just Dogs was not allowed to distribute literature or to solicit on its own behalf. Rather, Just Dogs was only permitted to serve food to employees who sought it. Moreover, Respondent notes that Just Dogs had a contract with Respondent which required proof of insurance, authorization to conduct business and assent to all Respondent's workplace policies, including the no-solicitation, no-distribution rule.

In *Knogo Corp.*, 262 NLRB 1346, 1362 fn. 58 (1982), enfd. in relevant part, 727 F.2d 55 (2d Cir. 1984), the Board held that by excluding a nonemployee union organizer from its parking lot while admitting a nonemployee vendor, the employer violated Section 8(a)(1) of the Act. Although conceding that *Knogo*, might require a finding of a violation, Respondent argues that *Knogo* should be limited because it is a pre-*Lechmere* case.

However, since the issuance of *Lechmere*, the Board has continued to find a violation of Section 8(a)(1) when an employer allows some nonemployees access to its property but denies this access to the union. See, e.g., *Albertson's, Inc.*, 332 NLRB 1132, 1134–1136 (2000), and cases cited therein; *Sandusky Mall*, 329 NLRB 618, 620 fn. 6 (1999), enf. denied 242 F.3d 682 (6th Cir. 2001). Indeed, in *Great Scot*, 309 NLRB 548, 549 (1992), enf. denied on other grounds 39 F.3d 678 (6th Cir. 1994), issued post-

Lechmere, the Board found the employer violated Section 8(a)(1) by asking the police to remove handbillers and by requesting the handbillers to leave the store's property. The Board found that the employer routinely allowed commercial vendors to setup portable wagons in the parking lot and also allowed civic organizations to conduct fundraising events in the parking lot. Thus, exclusion of the nonemployee union representatives constituted discrimination. Id.

By allowing a vendor access to the parking lot to sell food while prohibiting a nonemployee union organizer access to the parking lot to distribute union literature, applying the logic of *Knogo* and *Great Scot*, Respondent would be held in violation of Section 8(a)(1) pursuant to the *Babcock* discrimination policy.[6] *Great Scot* may be factually distinguished because "a wide range of commercial and charitable activity unrelated to the operation of its store" occurred. *Great Scot*, supra, 309 NLRB at 549. However, in *Knogo*, the only other nonemployee access allowed was a food truck.

Nevertheless, I am persuaded that Respondent did not violate Section 8(a)(1) on the basis of a disparate treatment theory on three bases. First, as noted above, when work-related nonemployee solicitation or distribution is allowed to assist the employer in carrying out its functions or when a nonemployee solicitation or distribution is allowed as "an integral part" of the employer's functions and responsibilities, such nonemployee solicitation or distribution is not evidence of disparate treatment. *Rochester General Hospital*, supra, 234 NLRB at 259; *George Washington University Hospital*, supra, 227 NLRB at 1374 fn. 39.

Respondent allowed one food vendor access to the parking lot. Although the provision of food from this vendor was not part of Respondent's benefit package in that employees had to pay for food procured from this vendor, the nearness of the vendor was a benefit to Respondent in allowing expeditious lunch for employees without the necessity of leaving the premises. It was a benefit for employees in providing a convenient food source which could provide enhanced productivity. Although it would be difficult to conclude that the hot dog vendor was "an integral part" of Respondent's functions, the test utilized in *George Washington University Hospital*,[7] it is possible to conclude that the hot dog vendor's presence in the parking lot was work-related in that it assisted Respondent in carrying out its functions, the test utilized in *Rochester General Hospital*. Based upon this analysis, I conclude that by allowing the hot dog vendor on its parking lot, Respondent did not waive its valid no-solicitation, no-distribution rule and permit access to the parking lot by the union.

Secondly, applying the theory of "similar distribution" mentioned in *Wal-Mart Stores*, supra at 1217, the distribution of union handbills, a persuader activity, is not a similar distribution to the selling of food. In fact, it is so dissimilar that it is difficult to find that Respondent waived its no-solicitation, no-distribution policy by allowing the food vendor to sell hot dogs in the parking lot. Respondent explicitly required Just Dogs to abide by its no-solicitation, no-distribution rule.

And, finally, the facts herein are distinguishable from those in *Great Scot*, where numerous vendors and commercial and charitable activities were allowed. *Knogo* is also distinguishable in that there in so evidence therein that the food vendor was subject to a valid no-solicitation, no-distribution rule.

On the other hand, although this argument is not made by the parties, Feist specifically testified that she was on public property at the time the guards asked her to leave. I credit this testimony. Attempts to thwart employee rights to receive literature from public property adjacent to the workplace constitutes interference with, restraint, and coercion of employees. See *Lechmere, Inc.*, 308 NLRB 1074 (1992) (on remand from the First Circuit following the decision of the Supreme Court). On this basis, I find that Respondent interfered with, restrained, and coerced employees.

E. Posting Literature in Cubicles: November 2002

There is no dispute that Respondent hired about 300 new employees from March through November 2002. One impact of the increased number of employees was that there were no longer sufficient cubicles for each employee. Accordingly, Respondent introduced a festival seating policy in September 2002. Under "Festival Seating," when employees arrive for their scheduled shift, they are to work in any empty cubicle in the event their normal cubicle is occupied.

In early November 2002, several employees posted a picture of actress Sally Fields from the movie "Norma Rae." The picture showed Fields holding a sign that said "UNION." Supervisors removed these pictures, citing a previously unpublished "two personal items per cubicle" rule and also referring to Respondent's policy against solicitation. The "two personal items per cubicle" rule, which was formalized in December 2002, allows two personal items and two business items in each cubicle.

Until the "Norma Rae" pictures were posted, there is no dispute that employees routinely posted religious, commercial, and

[6] In addition *Great Scot* and *Knogo*, I note that the cases cited by the General Counsel would yield the same result. For instance, in *Lucile Salter Packard Children's Hospital*, 318 NLRB 433 (1995), enfd. 97 F.3d 583 (D.C. Cir. 1996), the Board found the employer improperly banned nonemployee distribution of union literature while allowing flower vendors, jewelry vendors, and a clothing vendor, as well as charitable and tax-sheltered annuity and health care insurance providers. In *Ordman's Park & Shop*, 292 NLRB 953, 955–956 (1989), the employer discriminated against union distribution but allowed other organizations to use its sidewalks and store entrances for a broad range of activities. Finally, in *D'Alessandro's, Inc.*, 292 NLRB 81, 83–84 (1988), the Board found the employer unlawfully precluded union handbilling near customer doors while regularly allowing sale of items near the doors, handbilling on parked cars, display of boats and cars for sale in the parking lot, and sale of parking spaces by Jaycees during the state fair.

[7] In *Lucille Salter*, supra, 318 NLRB at 433, the Board characterized both *Rochester General Hospital* and *George Washington University Hospital* as based upon exceptions for "an integral part of the employer's health care functions and responsibilities." See also *Allied-Signal*, 296 NLRB 211, 218 (1989) (solicitation for United Way and for flowers for death in employee's family not disparate application of no-solicitation rule); *Ameron Automotive Centers*, 265 NLRB 511, 512 fn. 10 (1982) (nonemployee tool vendors who were permitted to solicit sales on premises were not a basis for finding discriminatory enforcement of no-solicitation rule); *Intercommunity Hospital*, 255 NLRB 468, 470 (1981) (United Fund, hospital guilds and philanthropies, Girl Scout projects for the hospital's benefit, drug salespersons and in-service training representatives are a "recognized and permissible exemptions from a valid no-solicitation rule. . . .").

social materials in their cubicles and these displays were knowingly allowed by Respondent. Based on this finding, I conclude that to the extent a "two item per cubicle" rule existed prior to December 2002, it was not enforced nor was the no-solicitation policy enforced regarding cubicle items. The selective enforcement of such rules upon the advent of union items appearing in cubicles constitutes disparate, selective enforcement. I find that by enforcing this rule selectively, Respondent interfered with, restrained, and coerced employees in the exercise of their Section 7 rights. See, e.g., *Wexler Meat Co.*, 331 NLRB 240, 242 (2000), and cases cited therein, holding that an employer violates Section 8(a)(1) by implementing a new policy or enforcing a previously unenforced policy, in response to union activity if the policy restricts lawful employee union activities.

F. Nonemployee Access to the Cafeteria: May 23, 2003

Since about November 2001, Steve's Alley Espresso has maintained a coffee cart in the cafeteria selling espresso-based coffee products, pastries, and coffee mugs to Respondent's employees. Owner Steve Miller explained that he has a contract with Respondent which requires that he maintain a license to operate, proof of insurance, a health certificate, and adherence to vendor guidelines. Miller explained that these vendor guidelines prohibit his distribution of literature. The parties stipulated that Respondent does not provide a fringe benefit for employee food service.

Additional food vendors include Mountain Man Fruit & Nut Company, Azteca Mexican Restaurant, Simon August Fine Catering, Smiley's Subs, and Eileen's Filipino Foods. These vendors usually report around 8:15 a.m. and leave around 2 p.m. These vendors are present 1 day per week except for Mountain Man Fruit & Nut Company which comes once a month. Snack Time Foods is allowed access to the facility to service vending machines which contain candy, soda, ice cream, and sandwiches.

On May 23, 2003, Cindy Feist, union organizer, and Pamela Malara, international union organizer, visited Respondent's McWilliams Road premises. They entered the lobby area and asked the security guard at the front desk, David, for the paperwork necessary to be allowed to distribute union literature in the cafeteria. Feist explained that she wanted the same paperwork that the vendors were required to complete. The guard asked where Feist was from and she responded she was from the Union. Feist asked to speak with George Kirby, site director.

Kirby came to the lobby about 5 minutes later. Feist asked him if she could fill out the paperwork that allowed vendors or visitors to visit the facility. She told Kirby she wanted to distribute union literature in the cafeteria. Kirby went to confer with Deanna Henirich. About 15 minutes later, Kirby returned and told Feist that she would not be allowed to fill out the paperwork because she was not an employee and could not solicit in the cafeteria. Feist argued that she understood that Costco and Mountain Man had both been allowed to come onto Respondent's property to solicit for membership in their organizations.[8] Kirby recalled that Feist claimed that she wanted access similar to that allowed Azteca and Snack Time Foods.

In any event, Kirby did not allow Feist to enter the cafeteria to distribute literature and/or solicit employees and he did not provide paper work similar to that completed by vendors or visitors. Kirby gave Feist Respondent's labor counsel's phone number for further questions.

It is clear that Respondent banned Feist, a nonemployee union organizer, from distributing union literature in the cafeteria but regularly allowed food vendors to distribute food, beverages, and mugs in the cafeteria. However, based on my earlier analysis of parking lot access, I find that an even stronger case is made here that the presence of the vendors was not only dissimilar to union solicitation and distribution, it was also work-related. In this case, the cafeteria was an area dedicated to break and lunch time, as a convenience for Respondent and its employees. By allowing food vendors limited access to the cafeteria for the purposes of selling food and food-related items, Respondent did not waive its valid no-solicitation, no-distribution rule.

VIII. ALLEGED PROHIBITION OF ACCESS FOR OFF DUTY EMPLOYEES

On November 7, 2002, Respondent published a rule stating that employees must leave the facility within a reasonable time after their working hours are over. On March 26, 2003, off duty employee Wood was handbilling outside Respondent's parking lot on the public sidewalk. An employee who was in the parking lot asked Wood for an authorization card. Wood went into the parking lot to give the card to the employee. Guard Vela approached Wood and told her to get off Respondent's property. There is no dispute that the employee who sought the authorization card was blocking the lane into the parking lot used for ingress. However, there is no evidence that this employee was told to move or leave.

In *Tri-County Medical Center*, 222 NLRB 1089 (1976), the Board held that, except where justified for business reasons, an employer rule that denies off-duty employees entry to outside nonworking areas of the employer's facility is invalid. Respondent has set forth no reason why off-duty employees may not enter the parking lot area. Accordingly, I find that by requiring off-duty employee Wood to leave the parking lot, Respondent interfered with, restrained, and coerced employees in the exercise of their Section 7 rights. See, e.g., *Teletech Holdings, Inc.*, 333 NLRB 402, 404 (2001).

IX. ALLEGED PROMULGATION AND MAINTENANCE OF RULE PROHIBITING EMPLOYEES FROM CRITICIZING RESPONDENT OR DISCUSSING TERMS AND CONDITIONS OF EMPLOYMENT WHILE ON RESPONDENT'S PREMISES

Hayward testified that in response to concerns voiced by two employees, he held two team meetings to stress positivism. On December 11, Hayward held one such meeting, attended by Oien, among others. According to Oien, Hayward told employees they were not to speak negatively about Respondent or Respondent's policies during working or nonwork hours. According to Hayward, he told employees at the meeting to be

[8] There is no independent proof of these solicitations. Nevertheless, this is included as part of the conversation, not to prove the assertions but only to show these statements were made.

respectful of their peers and use discretion in what they said because this would foster a positive work environment. He asked employees not to speak negatively while on the production floor. Hayward's meeting notes reflect,

> Stay positive. It is not appropriate to talk down or say negative things about your job or TeleTech when on the floor waiting for calls because it is disrespectful to those people who take pride and enjoy working for TeleTech. I am simply asking you to give courtesy when in the work environment, as I know for a fact that a lot of people on this team appreciate and like their jobs. Please just watch what you say, use discretion, and contribute to a friendly environment that we can all be more proud of.

Hayward, thus, admonished employees not to speak negatively about their job or Respondent. According to his notes, his admonishment applied when employees were on the floor waiting for calls. According to Oien, the admonishment applied to working and nonworking time. In either event, the admonishment reasonably tends to restrain or coerce employees in the exercise of Section 7 rights. See, e.g., *Lexington Chair Co.*, 150 NLRB 1328 (1965), enfd. 361 F.2d 283, 287 (4th Cir. 1966) (rule prohibiting employees from criticizing company rules and policies unlawful). Further, announcement of such an admonishment, even when no employee is disciplined pursuant to such policy, "serves to inhibit the employees' engaging in otherwise protected organizational activity." *Farah Mfg. Co.*, 187 NLRB 601, 602 (1970).

CONCLUSION OF LAW

By asking employees what they thought about the Union; telling employees that the Temple, Texas facility was closing because the employees there tried to form a union and that is what happens when employees try to form a union; requesting that an employee remove union insignia from her clothing, asking employees who were attempting to handbill for their names; making notes while watching handbilling activity; prohibiting union handbilling near the parking lot while; selectively enforcing cubicle ornamentation or no-solicitation guidelines only after union literature was placed in cubicles; prohibiting an off duty employee who was handbilling union literature from entering the parking lot; and telling employees they could not criticize their jobs or the company, Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

[Recommended Order omitted from publication.]